UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR REATIONS BOARD REGION 2

D & J AMBULETTE SERVICE, INC.

and

Case No. 02-CA-040254

ANGEL MORENO, An Individual

COUNSEL FOR THE ACTING GENERAL COUNSEL'S STATEMENT OF EXCEPTIONS TO THE ADMINSTRATIVE LAW JUDGE DECISION

Pursuant to § 102.46 of the Board's Rules and Regulations, Counsel for the Acting General Counsel (the "General Counsel") hereby files exceptions to the Decision and Recommended Order of Administrative Law Judge Raymond P. Green ("ALJD"). In his decision, which issued on June 12, 2012, the ALJ dismissed the Complaint in its entirety, failing to find that Respondent terminated employees in retaliation for their concerted, protected activities. Counsel for the General Counsel hereby excepts to the significant factual and legal findings and conclusions on which he based his failure to find the above violations, and his consequent failure to provide and appropriate remedy. Specifically, the exceptions are:

LUIS MONTAS' SUPERVISORY AND/OR AGENT STATUS

- 1. The ALJ erred, as a matter of fact and law, finding that Luis Montas ("Montas") was a lead mechanic and not a statutory supervisor or an agent of the Respondent. (ALJD p.2, ln. 49-52; pg. 3, ln. 1-24; pg. 12, ln. 3-5).
- 2. The ALJ erred, as a matter of law, in failing to consider record evidence that Montas granted employee Yhou Tejeda's ("Tejeda") request for time off. (Tr. 211).

- 3. The ALJ erred, as a matter of law, in failing to consider record evidence that Montas made the decision to terminate Tejeda. (Tr. 221-22, 248, 396, 492-93).
- 4. The ALJ erred, as a matter of law, in failing to consider record evidence that establishes the Respondent held out Montas as a supervisor, and therefore, was an agent of the Respondent. (Tr. 109, 212).
- 5. The ALJ erred, as a matter of law, in failing to consider that Montas testified he relayed work assignments from English-only speaking management to both non-English and English speaking employees "all the time." (Tr. 506, 531).
- 6. The ALJ erred, as a matter of fact, in finding that Montas translated work instructions from English-only speaking management to non-English speaking employees "from time to time." (ALJD pg. 2, ln. 51-52).
- 7. The ALJD erred, as a matter of law, in concluding that Montas' frequency of translation and relaying of assignments from English-only speaking management to non-English speaking employees was insufficient to establish Montas as an agent of the Respondent. (ALJD pg. 3, ln. 1-7, fn. 2).
- 8. The ALJD erred, as a matter of fact and law, in concluding that it was necessary for the General Counsel to establish that Montas was asked by management to translate on matters dealing with union or employment issues for Montas to be an agent of the Respondent. (ALJD pg. 3, ln. 10-17, fn. 2).
- 9. The ALJ erred, as a matter of law, in concluding that Montas did not translate on matters dealing with employment issues. (ALJD pg. 3, ln. 11; Tr. 506, 531).

ELI TALVY'S SUPERVISORY STATUS

- 10. The ALJ erred, as a matter of fact and law, in finding that Eli Talvy ("Talvy") was not a statutory supervisor or an agent of the Respondent. (ALJD pg. 2, ln. 38-47; pg. 3, ln. 19-24; pg. 5, ln. 5; pg. 12, ln. 13-15).
- 11. The ALJ erred, as a matter of fact and law, in finding that Talvy was a dispatcher by failing to consider the record evidence establishing that Talvy was the Respondent's Operations Manager. (ALJD pg. 2, ln. 40; Tr. 144, 546).
- 12. The ALJ erred, as a matter of law, in failing to consider record testimony establishing that Talvy hired and fired drivers and matrons. (Tr. 144).
- 13. The ALJ erred, as a matter of law, in failing to consider record testimony that Talvy changed employee Christopher Rodriguez' ("Rodriguez") schedule to include weekends. (Tr. 147).
- 14. The ALJ erred, as a matter of law, in failing to consider record testimony that Talvy routinely assigned Rodriguez work assignments. (Tr. 114-45, 157-58, 160, 171, 339-40, 551).

8(a)(1) STATEMENTS

15. The ALJ erred, as a matter of fact, in concluding that employees Tejeda and Carlos Valentin ("Valentin") had recounted differing versions of a conversation in which Montas made unlawful threats when, as the testimony reflects, Tejeda and Valentin were testifying about two, separate conversations involving Montas. (ALJD pg. 4, ln. 31-39; Tr. 111-13, 115, 215, 217).

16. The ALJ erred, as a matter of law, by dismissing all 8(a)(1) statements made by Montas to Tejeda and Valentin because the ALJ determined that Montas was not a statutory supervisor or agent. (ALJD pg. 12, ln. 4-6).

TESTIMONY FROM EDUARDO JURJO

- 17. The ALJ erred, as a matter of law, by improperly refusing to consider employee Eduardo Jurjo's ("Jurjo") affidavit, which was admitted into evidence, as a "past recollection recorded" exception to hearsay. (ALJD p. 5, ln. 41-47). (he cites to Tejeda's affidavit, ALJD pg. 3, ln 8-9).
- 18. The ALJ erred, as a matter of law, by failing to consider record evidence that Talvy interrogated Jurjo as to whether he signed a card for the Union. (GC. Exh. 14, pg. 2, ln. 24-26).
- 19. The ALJ erred, as a matter of law, by failing to consider record evidence that Talvy impliedly threatened Jurjo by telling him to lie to the owners of Respondent if they asked him whether he had signed a card for the Union. (Tr. 287; GC. Exh. 14, pg. 2, ln. 25-27).
- 20. The ALJ erred, as a matter of law, by failing to consider record evidence that admitted supervisor Skip Davoli ("Davoli") interrogated Jurjo as to whether Jurjo had cooperated with the Board's investigation of Respondent. (GC. Exh. 14, pg. 3, ln. 42-49).
- 21. The ALJ erred, as a matter of law, by failing to consider record evidence that Davoli impliedly threatened Jurjo by telling Jurjo that he could not tell the Board that employee Moreno had been discharged because Moreno had signed a card for the Union. (GC. Exh. 14, pg 3, ln. 42-49).

8(a)(3) TERMINATIONS

- 22. The ALJ erred, as a matter of law, by failing to find that the Respondent had knowledge of union activity based on his conclusions that Montas and Talvy were neither statutory supervisors or agents. (ALJD pg. 3, ln. 19-24; pg. 12, ln. 4-6, 21-22).
- 23. The ALJ erred, as a matter of fact and law, in refusing to find animus because

 Respondent has a collective bargaining relationship with a different union over a different group of employees and because Respondent had recently participated in an NLRB election after which it recognized the Union as the representative for about 60 matrons while stating that the timing of the discharges do evidence animus. (ALJD. pg. 11, lns. 31-34).
- 24. The ALJ erred, as a matter of fact and law, in concluding that Respondent had "produced evidence that in late July or early August, 2010, it made a decision to reduce costs and that this included the decision to park the tow truck because it was not saving or going to save as much money as had originally been anticipated." (ALJD pg. 12, ln. 11-14).
- 25. The ALJ erred, as a matter of law, in failing to consider record evidence that establishes using outside towing services was significantly more costly than using Moreno. (Tr. 28, 32-34, 65, 67, 442, 453, 457; GC. Exh. 17).
- 26. The ALJ erred, as a matter of law, in failing to consider and draw an adverse inference to Respondent's failure to produce any documents within their control demonstrating their economic defense with regards to employee Angel Moreno's ("Moreno") termination. (Tr. 459).
- 27. The ALJ erred, as a matter of law, in failing to consider and draw an adverse inference to Respondent's failure to call President Joseph Gallito and Vice President Steven Squitieri,

- witnesses entirely within Respondent's control and established through record evidence as the sole decision makers regarding Moreno's termination. (Tr. 470-73, 495).
- 28. The ALJ erred, as a matter of fact and law, in concluding that Respondent discharged Moreno at least in part because he refused to go out in the tow truck even though Respondent testified that it played no part in the decision to terminate him. (ALJD pg. 12, ln. 15-16; TR. 600).
- 29. The ALJ erred, as a matter of fact and law, in concluding that the Respondent "continues to replace a substantial number of its older vehicles with newer vehicles, thereby reducing the number of breakdowns that are likely to occur." (ALJD pg. 12, ln 17-18).
- 30. The ALJ erred, as a matter of fact, in determining that "Moreno testified that at the time of his leaving, the Respondent offered him a job as a van driver." (ALJD pg. 7, ln. 8-10, Tr. 616).
- 31. The ALJ erred, as a matter of fact and law, in concluding that "it is not particularly difficult or time consuming to obtain the necessary certification to be a van driver."

 (ALJD pg. 7, ln. 12-13). These conclusions are not supported by any record evidence and are not facts of which a judge may take judicial notice. Fed. R. Evid. 201(b).
- 32. The ALJ erred, as a matter of law, in failing to consider record evidence that Respondent gave Moreno a raise only one month prior to his termination. (TR. 67, 442).
- 33. The ALJ erred, as a matter of law, in concluding that the tow truck has not been used outside the facility by failing to consider record testimony that the tow truck had been spotted outside of Respondent's facility subsequent to Moreno's termination. (ALJD pg. 7, fn. 9; Tr. 61, 170).

- 34. The ALJ erred, as a matter of law, in failing to find that Moreno was terminated in violation of Section 8(a)(3) of the Act. (ALJD pg. 12, ln. 29-30).
- 35. The ALJ erred, as a matter of fact and law, in concluding that Valentin was unqualified to perform his job functions because he failed to complete mechanic school. (ALJD pg. 8, ln. 10-17).
- 36. The ALJ erred, as a matter of law, in failing to find that Valentin was terminated in violation of Section 8(a)(3) of the Act. (ALJD pg. 12, ln. 35-38).
- 37. The ALJ erred, as a matter of law, in failing to find that Rodriguez was terminated in violation of Section 8(a)(3) of the Act. (ALJD pg. 12, ln. 40-41).
- 38. The ALJ erred, as a matter of law, in failing to find that the General Counsel failed to establish a *prima facie* case regarding Tejeda's termination. (ALJD pg. 13, ln. 1-2).
- 39. The ALJ erred, as a matter of law, in failing to recommend an appropriate remedy for the unfair labor practices.

Dated at New York, New York This 24th day of July, 2012

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